CONSIDERATIONS

ON THE

QUESTION,

WHETHER

Tenants by Copy of Court Roll

ACCORDING TO

The CUSTOM of the MANOR,

Though not at the

WILL of the LORD,

Are FREEHOLDERS

QUALIFIED TO VOTE IN

ELECTIONS for KNIGHTS of the SHIRE.

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ADVERTISEMENT.

THE following treatiſe was originally drawn up, and is now committed to the preſs, at the inſtance of ſome gentlemen of diſtinguiſhed ſenatorial abilities; who are pleaſed to imagine that from thence a few hints may be gathered, not wholly unſeaſonable at this particular juncture [a].

In a country where the right of election depends upon a mode of tenure, which the elector muſt teſtify upon oath, the diſtinguiſhing marks of that tenure ſhould be clear and expreſs, beyond all poſſibility of doubt. It is therefore univerſally agreed to be neceſſary, that, in order to obviate the doubts which have lately ariſen, ſome line ſhould be drawn by the legiſlature; but, at what point to draw it, has given room for variety of ſentiment. It is here attempted to be ſhewn, that this line is already drawn by the maſterly hands of our anceſtors; though by length of time it is ſomewhat obſcured and forgotten: and that therefore there ſeems to

[a] See Votes of the Houſe of Commons, *Mercurii*, 1 *Die Martii*, & *Lunæ* 6 *Die Martii*, 1758.

be

be no occaſion to frame a new rule, but only (by a declaratory law) to revive and aſſert the old one.

It is no eaſy matter to foreſee, in any one county of the kingdom, what effect this doctrine may have upon this or that particular intereſt; much leſs throughout the kingdom at large. The aim of this enquiry has been to inveſtigate the truth, not to ſacrifice it to private attachments. The author therefore hopes, that theſe papers will be read with the ſame degree of candour with which they were compiled; and that ſuch as examine them attentively will pardon any inaccuracies of compoſition and ſtyle, which may have eſcaped his notice in the courſe of a haſty publication.

11 MAR. 1758.

THE

CASE.

A. B. has an eſtate of above forty ſhillings *per annum*, within the manor of C. which is holden by copy of court roll, to him and his heirs for ever, according to the cuſtom of the manor, (but not ſaid to be "at the will of "the lord") paying the accuſtomed rent, and performing the accuſtomed ſervices. This eſtate cannot be aliened or conveyed by feoffment, fine, or recovery in the king's courts of common law, but muſt for that purpoſe be ſurrendered into the hands of the lord, and the perſon to whoſe uſe it is ſur-

 rendered

rendered muſt be thereupon admitted in the court baron of the manor.

The Queſtion is,

WHETHER A. B. is a freeholder, within the meaning of the laws now in being, ſo as to entitle him to vote in the election of knights of the ſhire?

AND it is conceived that he is clearly no freeholder, within the meaning of thoſe laws; for which opinion the reaſons here follow at large.

IN all conſtitutions abſolutely popular, or in the democratical part of any mixed ſtate, the authority of the people in the management of public concerns is exerciſed by vote or ſuffrage. In little republics that ſuffrage has uſually been given in perſon, by every individual freeman of the ſtate: but in ENGLAND, where it is impracticable for *all* the freemen of the nation to debate and give their voices in a collective body, they do it by repreſentation; and, of courſe, in this kingdom, the authority of the people is exerted in the choice of repreſentatives to ſit in the houſe of commons.

IT is therefore a matter of no ſmall conſequence to the public, to ſtate with clearneſs and impartiality what perſons have, or have not, the privilege of giving their voices in the choice of theſe repreſentatives. This is here endeavoured to be done with regard to the caſe before us; in conſequence of a more diligent, and perhaps a more diſpaſſionate, ſearch, than

the hurry and attachments of thoſe gentlemen, of all denominations, who conſidered this queſtion about three years ago, would then permit them to make.

UPON the true theory and genuine principles of liberty, every member of the community, however mean his ſituation, is entitled to a vote in electing thoſe delegates, to whoſe charge is committed the diſpoſal of his property, his liberty, and his life. And this ought to be allowed him in every free ſtate, provided it be probable that ſuch a one will give his vote freely, and without influence of any kind. But ſince that can hardly be expected in perſons of indigent fortunes, or ſuch as are under the immediate dominion of others, (whoſe ſuffrages therefore are not ſo properly their own, as thoſe of their ſuperiors, on whom they depend;) all popular ſtates have therefore been obliged to eſtabliſh certain qualifications; whereby ſome, who are ſuſpected to have no will of their own, are excluded from voting, in order to ſet other individuals (whoſe wills may be ſuppoſed independent) more throughly upon a level with each other.

WITH regard to the qualifications of electors of knights of the ſhire, to ſit in the BRITISH houſe of

of commons, it muſt firſt be remembered that we are not to enquire at preſent what *would be* the beſt and moſt equitable conſtitution for this purpoſe, according to the modern ſtate of property in this country; but what really *is*, and long has been, our legal conſtitution in this point. Were we now to frame a new polity with reſpect to the qualifications of voters, reaſons might perhaps be ſuggeſted why copyholders, even holding at the nominal will of the lord, and the owners of beneficial leaſes for a term of years, ſhould be admitted to this privilege as well as freeholders; and why the value of freeholds themſelves ſhould be greatly advanced above what is now required by law to entitle the proprietor to give his vote in county elections. But this would be removing foundations; or at leaſt pulling down the ſuperſtructure, and erecting another in it's ſtead. The laws under which we now act, have ſubſiſted for more than three centuries; and, till the conſtitution is newmodelled, theſe are the only criteria to decide the preſent queſtion.

To explore therefore the intention of theſe laws, our enquiries muſt be carried back to the period in which they were made; we muſt examine the reaſons for making them, and for confining the right of ſuffrage to the perſons therein

therein deſcribed; and we muſt conſider what perſons were then underſtood to fall within that deſcription; for theſe perſons only can properly be admitted to the privilege of voting in elections.

OUR legal antiquarians are of opinion, that originally all landholders, or barons, who held immediately of the king *in capite*, had ſeats in the great council or parliament, till about the reign of king JOHN; when, by the many alienations and minute ſubdiviſions of property, the conflux of them became ſo large and troubleſome, that the king was obliged to divide them, and ſummon only the greater barons to attend in perſon, leaving the ſmall ones to ſit by repreſentation (together with the citizens and burgeſſes) in another houſe; which gave riſe to the ſeparation of the two houſes of parliament [a].

THE repreſentatives of theſe inferior barons being uſually knights, (or ſuch as held a knight's fee at the leaſt, and were therefore liable to knighthood) and being returned out of every county in the kingdom, were thereupon denominated KNIGHTS of the SHIRE.

IN what manner, and at what time, the election of theſe knights of the ſhire was inveſted

[a] SELDEN, Titl. of Hon. 2. 5. 31. ---- GILBERT, Hiſt. of the Exchеq. c. 3.

in

in the county at large, which formerly was confined to the king's tenants *in capite* only, is a point pretty difficult to determine; and, when determined, would rather be matter of curioſity, than at all neceſſary to explain the queſtion before us. It will be ſufficient for us to take up the matter, as it ſtands upon record in our ſtatutes; an evidence upon which we may build more ſafely than upon any the moſt plauſible hypotheſis, or ingenious conjecture of the learned. The firſt of which ſtatutes is that of 7 HEN. IV. c. 15. which directs the knights of the ſhire to be elected in the county court: a court, to which all the freeholders are ſuitors; and wherein therefore formerly the elections of ſheriffs and conſervators of the peace were held, and wherein the coroners and verderors are ſtill choſen. This ſtatute ordains theſe knights to be elected by "al that "be there preſent, as well ſutours duely ſom-"moned for the ſame cauſe, as other:" meaning probably thereby to reſtrain the partiality of ſheriffs, (which is complained of in the preamble) who ſummoned what freeholders they pleaſed, and admitted only thoſe to vote who were actually ſummoned; whereas the ſtatute (as I underſtand it) now directs him to admit the votes of all ſuitors preſent, whether duly ſummoned or no.

BUT whether it was that the ambiguity of this expreſſion afforded room for thoſe who were no ſuitors, (that is, no freeholders) to claim a vote at the election, or whether only every minute freeholder was admitted to poll, without any reſtriction as to value, which is ſtill the caſe with regard to coroners and verderors; we find in a ſhort time afterwards complaint made, in the preamble to the ſtatute of 8 HEN. VI. c. 7. that "electyons of knyghtes of the ſhyres in "many counties now late have ben made by "very great, outragious, and exceſſyve nom-"bre of people, dwellynge within the ſame "counties, wherof the moſte partie was of "people of ſmal ſubſtaunce and of no valour, "wherof every of them pretended a voyce "equivalent, as to ſuche electyons to be made, "with the moſte worthye knyghtes and eſquyars "dwellynge within the ſame counties:" for remedy whereof it is therefore enacted, "that "the knyghtes of the ſhyres ſhal be choſen by "people dwellyng and reſyaunt in the ſame "counties, wherof every one ſhall have FREE "LAND OR TENEMENT to the valour of forty "ſhillings by yere at the leaſt above all charges;" and that the ſheriff may examine the voters on oath how much they may ſo expend. This ſtatute is explained and amended by another in the next parliament, 10 HEN. VI. c. 2. which recites,

recites, that the FREEHOLD, required by the late ſtatute was not expreſsly mentioned and directed to be *within* the county for which the election is to be made; wherefore, for plain declaration thereof, it is ordained that every elector "ſhal have "FREHOLD to the valoure of fourty ſhelynges "by yere at the leſt, above al charges, within "the ſame countie where any ſuche choſer wyl "medle of any ſuch electyon." And upon theſe ſtatutes ſtands the law of all county elections at this day; for the ſtatute of 18 GEO. II. c. 18. is, with regard to this point, entirely built upon and tranſcribed from theſe.

THE queſtion therefore will be briefly this; whether the ſpecies of tenants now before us were deemed to have *free land* or *tenement*, (or to have *freehold)* at the making of theſe ſtatutes in the reign of HENRY the ſixth? And this it is apprehended they had not; and conſequently are not freeholders at this day, within the meaning of theſe acts of parliament.

BUT, in order to ſhew more clearly what eſtates held by this tenure are *not*, it may firſt be proper to ſtate what it is imagined they *are*; ſince they do not very often fall within the conſideration even of our moſt practiced lawyers. And they ſeem to be no other than what were

well known to our antient law under the denomination of eſtates in PRIVILEGED VILLENAGE, or VILLAN-SOCAGE, which tenure *chiefly* ſubſiſted in manors of *antient demeſne*. And lands and tenements, holden by this tenure, are apprehended not to have been FREE LANDS and TENEMENTS at the common law. In ſupport of which opinion in both it's branches, it is here undertaken to be ſhewn, firſt, that theſe eſtates are eſtates in VILLAN-SOCAGE: ſecondly, that eſtates in VILLAN-SOCAGE were never comprized under the denomination of FREE LANDS or TENEMENTS.

I. THERE ſeem to have ſubſiſted among our anceſtors four principal ſpecies of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the ſeveral ſervices or renders, that were due to the lords from their tenants. Theſe ſervices, in reſpect of their quality, were either *free* or *baſe* ſervices; in reſpect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* ſervices were ſuch as were not unbecoming the character of a ſoldier, or a freeman, to perform; as to ſerve under his lord in the wars, to pay a ſum of money, and the like. *Baſe* ſervices were ſuch as were fit only for peaſants, or perſons of a ſervile rank; as to plow the lord's land,

land, to make his hedges, to carry out his dung, or other mean employments. The *certain* ſervices, whether free or baſe, were ſuch as were ſtinted in quantity, and could not be exceeded on any pretence; as, to pay a ſtated annual rent; or to plow ſuch a field for three days. The *uncertain* depended upon unknown contingencies; as to do military ſervice in perſon, or pay an aſſeſſment in lieu of it, when called upon; or to wind a horn whenever the SCOTS invaded the realm; which are free ſervices: or to do whatſoever the lord ſhould command; which is a baſe or villan ſervice.

FROM the various combinations of theſe ſervices have ariſen the four kinds of lay tenure which ſubſiſted in *England*, till the middle of the laſt century; and three of which ſubſiſt to this day. Of theſe BRACTON (who wrote under HENRY the third) ſeems to give the cleareſt and moſt compendious account, of any author antient or modern [b]; of which the following is the outline or abſtract [c]. "*Tenementorum aliud* "LIBERUM, *aliud* VILLENAGIUM. *Item*, LIBE- "RORUM *aliud tenetur liberè pro homagio &* "*ſervitio militari*; *aliud in libero ſocagio cum fi-* "*delitate tantum.*" And again [d], "VILLENAGIO- "RUM *aliud* PURUM, *aliud* PRIVILEGIATUM.

[b] L. 4. tr. 1. c. 28. [c] §. 1. [d] §. 5.

" *Qui tenet in* PURO VILLENAGIO *faciet quicquid*
" *ei præceptum fuerit, & ſemper tenebitur ad in-*
" *certa. Aliud genus villenagii dicitur* VILLANUM
" SOCAGIUM; *& hujuſmodi villani ſocmanni —*
" *villana faciunt ſervitia, ſed certa & determi-*
" *nata.*" Of which the ſenſe ſeems to be as follows: Firſt, where the ſervice was FREE, but UNCERTAIN, as military ſervice with homage, that tenure was called the tenure in chivalry, *per ſervitium militare*, or by knight ſervice. Secondly, where the ſervice was not only FREE, but alſo CERTAIN, as by fealty only, by rent and fealty, &c. that tenure was called *liberum ſocagium*, or free ſocage. Theſe were the only *free* holdings or tenements; the others were *villenous* or ſervile; as, thirdly, where the ſervice was BASE in it's nature, and UNCERTAIN as to time and quantity, the tenure was *purum villenagium*, abſolute or pure villenage. Laſtly, where the ſervice was BASE in it's nature, but reduced to a CERTAINTY, this was ſtill villenage, but diſtinguiſhed from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be ſtill called ſocage (from the *certainty* of it's ſervices) but degraded by their *baſeneſs* into the inferior title of *villanum ſocagium*, villan-ſocage.

BESIDES

BESIDES theſe *lay* tenures, there ſubſiſted, and ſtill ſubſiſts, another which is a *ſpiritual* tenure, called the tenure *in libera eleemoſyna*, or *frank almoign*; the tenants in which were bound only to perform divine ſervice; and by which all eccleſiaſtical perſons and corporations now hold their lands and tenements, and have ſo done at leaſt ever ſince the time of BRACTON. "*Item*, ſays he, "*liberorum* [*tenementorum*] *aliud puræ et* "*liberæ et perpetuæ eleemoſynæ, quæ quidem ſunt* "*tam in bonis hominum quam in bonis dei; quia* "*dantur non ſolum deo et tali eccleſiæ, ſed abba-* "*tibus et prioribus ibidem deo ſervientibus*[c]." Thoſe who hold by this tenure are freeholders in the ſtrongeſt ſenſe; and therefore any portions of tythes or other eccleſiaſtical dues, held either by ſpiritual perſons, or by ſuch lay appropriators as have ſucceeded them in their eſtates and immunities, are freehold eſtates, whether the lands out of which they iſſue are bond or free; being a ſeparate and diſtinct inheritance from the lands themſelves. And, in this view, they muſt be diſtinguiſhed and excepted from other incorporeal hereditaments iſſuing out of lands, as rents, &c. which in general will follow the nature of their principal, and cannot be freehold unleſs the ſtock from which they ſpring be freehold alſo.

[c] L. 4. tr. 1. c. 28. §. 1.

BUT

BUT although the clergy be thus indiſputably freeholders, in right of the church, yet as till within a century paſt they were not taxed to the ſubſidies granted by the commons in parliament, but only to thoſe granted by their own eccleſiaſtical ſynod or convocation, they therefore ſent only proctors to the convocation, and not repreſentatives to parliament; having no votes for knights of ſhire [f] till 1664; when being taxed for the firſt time to the lay ſubſidy or aſſeſſment, (by the ſtatute of 16 and 17 CAR. II. c. 1.) the eccleſiaſtical ſubſidies were thereupon laid aſide; and the clergy in recompenſe were admitted to vote for knights of the ſhire [g]. This admiſſion of the clergy to the right of ſuffrage, rather ſeems to have ariſen from univerſal tacit conſent, dictated by the reaſon of the thing, than from any poſitive law: for there appears no ſtatute of that time, or reſolution of the commons in their journals, which expreſsly or impliedly directs ſuch admiſſion; till the ſtatute of 10 ANN. c. 23. which mentions "preſentation to a benefice" as a means, whereby ſuch a freehold as entitles to a vote may be acquired. But let us return from this digreſſion to our lay tenures.

[f] DALTON of Sheriffs, 418.

[g] GILB. Hiſt. of Exchеq. c. 4. HUME's Hiſt. of G. B. II. 163.

THESE

THESE appear from what has been premiſed to have been originally four.

1. THE tenure in CHIVALRY, or by KNIGHT-SERVICE, was evidently derived from that northern ſyſtem of military policy, which ſpread itſelf over all the weſtern world at the diſſolution of the ROMAN empire, called the doctrine of FIEFS or FEUDS. This was the higheſt and moſt honourable tenure of all; but at the ſame time, by means of it's feodal rigours was exceedingly burthenſome to the ſubject: wherefore, about the middle of laſt century, having fallen into neglect during the civil wars, it was finally aboliſhed by act of parliament at the reſtoration of king CHARLES the ſecond; and all lands holden thereby were directed to be holden by the next ſpecies of tenure. Wherefore

2. THE tenure in FREE AND COMMON SOCAGE (which was alſo in ſome degree of a feodal nature, but accompanied with greater immunities than the former) is that whereby all free lands and tenements in the kingdom are at preſent holden, except thoſe in *frank almoign*, whereof we have juſt now ſpoken. Lands and tenements, holden by this tenure, may be aliened from one man to another, without the aid and aſſiſtance of any third perſon,

by

by feoffment with livery of ſeiſin, or other uſual conveyances by deed: they cannot be ſued for or recovered in any court but the king's public courts of common law: they are not liable (when held in feeſimple) to any other forfeiture than only for treaſon and felony: and their tenants or owners are the proper ſuitors to the county court, wherein the law has directed all elections by freeholders to be made.

3. THE tenure in PURE VILLENAGE was that wherein the antient *nativi*, or villeins by birth, originally held their ſcanty pittances of land, by the moſt baſe and ſordid ſervices, and abſolutely *at the will of the lord*; being neither permitted to hold them againſt the lord's inclination, nor to quit them without his permiſſion. A perſon, free by birth, might indeed take lands to hold by this tenure; and, in ſuch caſe, he was alſo removeable at the will of the lord; but on the other hand, might alſo quit and renounce the tenancy, whenever he himſelf thought proper. For he was bound to perform thoſe ſervile duties only, as BRACTON expreſſes it[h] "*nomine villenagii, et non nomine perſonæ*;" in reſpect of the tenure of his land, and not his own perſonal condition. But he informs us[i],

[h] L. 4. tr. 1. c. 28. §. 5. [i] Ibid.

that

that " *ille qui tenet in villenagio, ſive li-* " *ber ſive ſervus, faciet de villenagio quicquid* " *ei præceptum fuerit, nec ſcire debet ſerò quid* " *debeat facere in craſtino, et ſemper tenebitur* " *ad incerta.*" In the ſame manner the MIRROIR alſo obſerves [k], " *ſi tenent fiefs le ſeignours,* " *eſt a entendre que ils le tiennent de jour en jour* " *a la volunt des ſeignours; ne per nul certaine* " *de ſervices.*" The original of this tenure is variouſly aſſigned by different writers. The moſt antient account we have of it is in the old dialogue *de ſcaccario* [l], attributed to GERVASE of TILBURY; and which Mr. MADOX is of opinion [m] was compoſed in the reign of king HENRY the ſecond. We are there told, that this was the condition to which the natives of ENGLAND were reduced, after their total conqueſt by the NORMANS. Others, with more reaſon, have ſuppoſed that the ſtate of villenage is in ſome degree a monument of DANISH tyranny. But whatever their original might be, theſe pure villeins are now, by the aſſiſtance of cuſtom, and a a ſeries of immemorial indulgence, arrived nearly to the ſame ſtate *in fact* as the privileged villeins of whom we ſhall next ſpeak, though there is ſtill a great *nominal* diſtinction between them. For they are now ſprouted up into the uſual ſort of modern copyholders, who ſtill hold *at the* nominal *will of the lord*, though regulated

[k] C. 2. §. 28. [l] L. 1. c. 10. p. 26. [m] Pref. p. vi.

according

acording to the cuſtom of the manor. " For copy-
" holders, ſaith FITZHERBERT, [n] is but a new-
" found term; for of antient times they were
" called tenants in villenage, or by baſe tenure."
Theſe, it is agreed on all hands, though they have now by cuſtom a ſure and indefeaſible eſtate ſo long as they perform their ſervices, (which are pretty generally turned into pecuniary rents) have no right to any vote, as freeholders; whatever their intereſt may be, whether for life, in tail, or in feeſimple. Some modern ſtatutes have indeed by expreſs proviſions permitted them to ſerve on juries, as *liberos et legales homines*; but this is a plain indication, that till the legiſlature made them ſo in this inſtance, they were held not to be ſo in any.

4. THE fourth and laſt tenure is that in PRIVILEGED VILLENAGE, or VILLAN-SOCAGE; of which we are principally to enquire. And BRACTON [o] gives this account of its original: " *Fuerunt in conqueſtu liberi homines, qui libere*
" *tenuerunt tenementa ſua, per libera ſervitia*
" *vel per liberas conſuetudines; et cum per poten-*
" *tiores eſſent ejecti, poſtmodum reverſi receperunt*
" *eadem tenementa ſua tenenda in villenagio;*
" *faciendo inde opera ſervilia, ſed certa et nomi-*
" *nata. Qui quidem dicuntur glebæ aſcriptitii,*
" *et nihilominus liberi, licet faciant opera ſer-*

[n] N. B. 12, c. [o] L. 1. c. 11.

" *vilia;*

" *vilia; cum non faciunt ea ratione* PERSO-
" NARUM *ſed ratione* TENEMENTORUM. *Et*
" *ideo aſſiſſam novæ diſſeiſinæ non habebunt, quia*
" *tenementum eſt villenagium, quamvis privilegi-*
" *atum; nec aſſiſam mortis anteceſſoris; ſed tantum*
" *parvum breve de recto, ſecundum conſuetudinem*
" *manerii. Et ideo dicuntur glebæ aſcriptitii,*
" *quia tali gaudent privilegio, quod a gleba amo-*
" *veri non poterint, quamdiu ſolvere poſſunt debi-*
" *tas penſiones;—nec compelli poterint ad tale tene-*
" *mentum tenendum niſi voluerint.*" And again [p],
" *Eſt etiam aliud genus villenagii, quod tenetur de*
" *domino rege a conqueſtu* ANGLIÆ, *quod dicitur*
" *ſocagium villanum; et quod eſt villenagium,*
" *ſed tamen privilegiatum. Habent itaque te-*
" *nentes de dominicis domini regis tale privilegium,*
" *quod a gleba amoveri non debent, quamdiu ve-*
" *lint et poſſint facere debitum ſervitium; et*
" *hujuſmodi villani ſocmanni propriè dicuntur*
" *glebæ aſcriptitii. Villana autem faciunt ſer-*
" *vitia, ſed certa et determinata. Nec com-*
" *pelli poterunt contra voluntatem ſuam ad te-*
" *nenda hujuſmodi tenementa, et ideo dicuntur li-*
" *beri. Dare autem non poſſunt tenementa ſua,*
" *nec ex cauſa donationis ad alios transferre, non*
" *magis quam villani puri; et unde, ſi transferri*
" *debeant, reſtituunt ea domino vel ballivo, et*
" *ipſi ea tradunt aliis in villenagium tenenda.*"

[p] L. 4. tr. 1. c. 28. §. 5.

THE author of FLETA likewiſe, who wrote under EDWARD the firſt, gives much the ſame account of them. [q] "*Erant olim liberi homines* "*liberi tenentes, quorum quidam cum per poten-* "*tiores a tenementis ſuis ejecti fuerant, eadem* "*poſtmodum in villenagium tenenda reſumpſerunt.* "*Et, quia hujuſmodi tenentes cultores regis eſſe* "*dignoſcuntur, proviſa fuit quies ne ſectas fa-* "*ciant ad comitatum, vel hundredum, vel ad* "*aliquas inquiſitiones, aſſiſas, vel juratas.* — "*Horum tenementa ſunt villenagium domini pri-* "*vilegiatum. Et ideo dicuntur glebæ aſcriptitii,* "*eò quod ab hujuſmodi glebis amoveri non debent* "*quamdiu ſolverint debitas penſiones: nec com-* "*pelli poterunt ad hujuſmodi tenementa tenenda* "*contra ſuas voluntates, eo quod corpora ſua ſunt* "*libera.* — *Proviſum eſt etiam, quod hujuſmodi* "*tenentes inter ſe tantum unicum beneficium ha-* "*beant recuperationis tenementorum, per quoddam* "*breve de recto clauſum ballivo manerii diri-* "*gendum; quod plenum rectum teneat querenti* "*ſecundum conſuetudinem manerii.*"

To theſe we may ſubjoin the authority of BRITTON, who was cotemporary with the author laſt cited, and wrote by the command and in the name of king EDWARD the firſt. "[r] *Et aſcun gents ſount, que ſount fraunks de*

[q] L. 1. c. 8. §. 2.

[r] C. 66. p. 165.

"*ſaunk,*

" *ſaunk, & tenent terre de nos en villeinage; &*
" *ſont proprement nos ſokemans, & ceux ſount*
" *privileges en tele maner, que nul ne les doit*
" *ouſter de tielx tenements, taunt come ils ſount*
" *les ſervices que a lour tenements appendent; ne*
" *nul ne poit lour ſervices acreſtre ne chaunge, a*
" *faire auters ſervices ou plus, autrement que ils*
" *ne ſoloient. Et pur ceo que tielx ſokemans*
" *ſount nous gaynours de nos terres, ne volons mye*
" *que tele gents ſoient ſomouns de nule part tra-*
" *vailler en jures ne enqueſtes, forſque en*
" *maners a queux ils appent. Et pur ceo que*
" *nous volons que ils eyent tele quiete, eſt ordine le*
" *brefe de droit clos pledable par baillyfe del*
" *maner (de tort fait a l'un ſokeman par l'autre,*
" *que il teigne les pleintyfs a droit) ſolonc les*
" *uſages del maner, par ſimples enqueſtes.*"

THIS is farther confirmed and illuſtrated by the deſcription of a ſokman given us by the compiler of the OLD NATURA BREVIUM [s]; which ſeems to have been contemporary with the ſtatute we are now explaining, being written about the reign of king HENRY the ſixth.
" *Nota que ſokman proprement eſt tiel qui eſt*
" *frank, & tient de roy, ou d'autre ſeignouer*
" *d'auncien demeſne, terres ou tenementez in ville-*
" *nage; et eſt privilege in ceſt maner, que nul*

[s] Tit. brief de recto clauſo.

" *luy*

" *luy doyt ouſtre hors de ces terres ne tenementes,*
" *tanque come il puit faire les ſervices queux a ces*
" *terres & tenementes appertegnent. Ne aſcun*
" *poet ſes ſervices accreſer, ne conſtreigner a*
" *faire pluſours ſervicez, que faire ne doit.—*
" *Et nul ſokman poet empleder auter ſokman de*
" *terres ne de tenementez deinz auncien demeſne*
" *per autere brief que ceſt brief de droit clos.*"

By conſidering the ſeveral properties of tenants in villan-ſocage, as they may be gathered from theſe antient authors, we ſhall find ſo ſtriking a reſemblance, that we may eaſily be convinced they ſtill ſubſiſt in that ſpecies of tenants, which are the ſubject of our preſent enquiry: and this in much the ſame ſtate as formerly; ſave only that their villan ſervices are turned into money-rents, as well as thoſe of pure villeins. For we muſt not (with ſome) degrade theſe tenants into the rank of *puri villani*, or common copyholders, by ſuppoſing the words " *at the will of the lord*" to have been omitted in their copies by fraud or accident; neither muſt we (with others) raiſe them into the degree of *liberi ſocmanni*, or common freeholders, by forgetting all their badges of villenage.

1. The firſt point of reſemblance between the two ſpecies of tenants is this; that moſt of the manors

manors in which they were antiently, or are now to be found, are manors of *antient demeſne*; and thoſe few which are found in other manors, may be fairly ſuppoſed to have had their original in imitation of theſe, by convention or compact with the lord. Antient demeſne, *antiquum dominicum regis*, conſiſts of thoſe manors, which (though now perhaps granted out to private ſubjects) were actually in the hands of the crown in the reign of EDWARD the confeſſor, and at the acceſſion of WILLIAM the conqueror; and ſo appear to have been by the great ſurvey in the exchequer, called *Domeſday* book [t]. In theſe manors, according to the old authors above cited, were to be found all the four ſpecies of tenants we have mentioned, "*Sunt feoda militaria, & liberi tenentes, & puri nativi, ſicut alibi in regno*" [u]. And for prevention of the encroachments of the pure villeins, who ſeem to have aſpired to the ſtate of villan-ſocmen, endeavouring by exemplifications of *Domeſday* book to enfranchiſe their bodies and change the condition of their tenures, was the ſtatute of 1 RIC. II. c. 6. enacted. But though theſe manors had the other ſpecies of tenants in common with the reſt of the kingdom, yet this mixed kind of tenants, or villan-ſocmen, were almoſt peculiar to themſelves; as ſtill is the caſe

[t] F. N. B. 14, 16.

[u] FLET. L. 1. c. 8.

with

with regard to our copyhold tenants, who hold not at the will of the lord: for theſe are chiefly to be met with in manors of antient demeſne, or elſe in manors that bear a near relation to the crown, being parcel of the duchy of CORNWALL [w], or the old principality of WALES [x].

2. THEY are not members of the county-court; i. e. not ſuitors, or ameſnable to the ſame. "*Non ſectas faciunt ad comitatum*," ſays the author of FLETA [y] ſpeaking of villan ſocmen, and the ſame is generally true of the tenants which are now before us.

3. BOTH of them have the ſame indelible character of incapacity to aliene by feoffment, leaſe and releaſe, or other uſual conveyances by deed, and the ſame neceſſity of ſurrendering them for that purpoſe in court, to the lord or his ſteward. Thus much is implied in the words "*dare*," and "*cauſa donationis transferre*:" For the antient writers of the law, ſays lord COKE [z], called a feoffment *donatio*; and he adds, that the verb *do* or *dedi* is the apteſt word of of feoffment. Let us then obſerve theſe emphatical words of BRACTON, above cited [a]: "DARE *autem non poſſunt tenementa, nec cauſa*

[w] CARTHEW, 432.
[x] CRO. CAR. 229.
[y] Ubi ſupr. l. 1. c. 8. §. 2.
[z] Co: LITT. 9.
[a] L. 4. tr. 1. c. 28. §. 5.

"DONATIONIS

" DONATIONIS *ad alios transferre, non magis*
" *quam villani puri; et unde ſi transferri de-*
" *beant, reſtituunt ea domino vel ballivo, et ipſi*
" *tradunt aliis in villenagium tenenda.*" Which in our modern law-phraſe would run thus. " They cannot convey their lands by feoffment, " any more than common copyholders can; " but muſt ſurrender them to the lord or his " ſteward; who give ſeiſin thereof to the *ceſtuy* " *que uſe*, to be holden by copy of court roll."

4. NEITHER of theſe tenants could or can ſue or be ſued for their lands, by the uſual real actions of aſſiſe, writ of entry, &c. in the king's courts of common law. " *Aſſiſam non* " *habebunt*," ſays BRACTON [b]. And therefore no fine can be levied, and no common recovery ſuffered in the king's courts, of lands holden by theſe tenures. For thoſe wellknown fictions of law are grounded, the one upon the ſuppoſed commencement, the other upon the ſuppoſed determination, of a ſuit or real action at law. But the only method of recovering theſe tenements is by a peculiar method of proceſs, called a WRIT OF RIGHT CLOSE. " *Unicum habent* " *beneficium recuperationis per quoddam breve de* " *recto clauſum*," ſays the author of FLETA [c]; with whom BRACTON agrees, as well in the

[b] L. 1. c. 11. [c] L. 1. c. 8. §. 2.

 paſſages

paſſages above cited, as alſo (among many others) in the following: " *In dominicis domini* " *regis, ſc. in villenagiis privilegiatis, nec aſſiſa* " *novæ diſſeyſinæ, nec aſſiſa mortis anteceſſoris,* " *nec aliud breve, niſi tantum parvum breve de* " *recto ſecundum conſuetudinem maneriorum, cur-* " *rit*[d]." And again: " *Nec in dominicis do-* " *mini regis jacet aſſiſa mortis anteceſſoris, nec* " *novæ diſſeyſinæ, quia ibi non eſt liberum tene-* " *mentum ſed villenagium privilegiatum; nec* " *etiam breve de recto magnum, quia loco omnium* " *accipitur parvum breve ſecundum conſuetudinem* " *manerii*[e]." And in this point alſo BRITTON, and the reſt of the antient authorities before cited, concur.

5. LASTLY, as the villan-ſocman was diſtinguiſhed from the pure villein, in that he could not be removed from his eſtate at the will of the lord; " *a gleba amoveri non debet, quamdiu* " *velit & poſſit facere debitum ſervitium*;" ſo, ſince this will of the lord is by cuſtom become merely nominal, the ſame nominal diſtinction is kept up between the common copyholders and this privileged ſort; the words " at the will of " the lord" being ſtill preſerved in the copies of the former, and totally omitted in thoſe of the latter; which omiſſion is indeed almoſt the

[d] L. 4. tr. 1. c. 9.

[e] L. 4. tr. 3. c. 13. §. 3.

only

only difference now remaining betwixt them; common copyholders having arrived (by a ſeries of encroachment on their lords) at nearly the ſame ſtate of enfranchiſement, which the privileged copyholders alone enjoyed by the antient law.

FARTHER to confirm what has been ſaid, lord COKE[f] (giving an account of theſe tenures, which he calls copyholds of frank tenure) obſerves that they "are moſt uſual in antient demeſne: "though ſometimes out of antient demeſne "we meet with the like ſort of copyholds; "as in *Northamptonſhire* there are tenants "which hold by copy of court roll, and have "no other evidence, and yet hold not at the "will of the lord." And ſo Mr. KITCHEN[g] ſays, "I have ſeen in the county of *Northampton* "copyholders of frank tenure, out of antient "demeſne; and they have uſed a writ of right "cloſe, and have no other evidence but by "copies, according to the cuſtom of the manor; "but their copies are not at the will of the "lord." And again,[h] "In ſurrenders of lands "in antient demeſne of frank tenure, it is not "uſed to ſay, to hold at the will of the lord, "in theſe copies; but to hold according to the

[f] Copyholder. §. 32.
[g] Of courts. tit. copyhold.
[h] Tit. court of antient demeſne.

" cuſtom of the manor, by the ſervices before " due; and it is not ſaid there, at the will of " the lord." To theſe may be added Mr. WEST; who [i] firſt lays down the general definition of a copyholder; " He which is ad- " mitted tenant of any lands or tenements " within a manor, that time out of memory " of man have been demiſable and demiſed to " ſuch as will take the ſame, in fee, feetail, " for life, years, or at will, according to the " cuſtom of the ſaid manor, by copy of court " roll of the ſame manor. And therefore they " be called tenants by copy of court roll, be- " cauſe they have no other writings or evidence " concerning ſuch their lands and tenements, " but only the copies of the rolls of the courts " of the manors, within which they lie." And then [k] he diſtinguiſhes the preſent ſpecies of copyholds from others, thus. " In ſome " manors, the tenants have the lands granted " unto them and their heirs, in fee, feetail, " or for life, or years, according to the cuſtom " of the manor; and not at the will of the " lord according to the cuſtom: In which caſe " the rolls and copies ought to be made ac- " cordingly." All which proves, that the omiſſion of theſe words in its original was neither fraudulent nor accidental, but is a badge

[i] Symboleography §. 603. [k] §. 605.

well

well known to the law, as a kind of family-diſtinction between ſuch copyholds as are deſcended from pure, and ſuch as are from privileged villenage.

THE whole that has been here advanced may be exemplified by a copy of court roll which is found in the old CHARTUARY, or collection of antient deeds and forms in conveyancing[1], which is called *copia curie ſecundum conſuetudinem manerii*, and follows in theſe words; " *Ad curiam ten-*
" *tam ibidem quinto die Aprilis anno regni regis*
" EDVARDI *quarti undecimo, M. B. de C. & A.*
" *Uxor ejus, hic in plena curia examinati, ſurſum*
" *reddiderunt in manus domini unum meſſuagium*
" *& dimidiam virgatam terre cum ſuis pertinen-*
" *tiis in N. predicto vocatam P. ad opus W. C.*
" *de* OXON. *Unde accidunt domino de harieto,*
" ijs. *Et ſuper hoc venit predictus W. & cepit*
" *de domino dictum meſſuagium et dimidiam*
" *virgatam terre cum ſuis pertinentiis, haben-*
" *dum et tenendum ſibi, et A. uxori ſuæ, here-*
" *dibus et aſſignatis ipſius W. in perpetuum,*
" *ſecundum conſuetudinem manerii, per reditus,*
" *conſuetudines, et ſervitia inde prius debita et*
" *conſueta. Et dant domino de fine, pro ingreſſu*
" *ſuo habendo in dicto meſſuagio et dimidia*
" *virgata terre cum pertinentiis,* XS; *et fecerunt*

[1] Fol. 368. edit. 1534.

" *domino*

" *domino fidelitatem, & data eſt eis inde* " *ſeiſina.*"

THIS ſeems to be convincing evidence, that theſe tenures are of the ſame nature with BRACTON's villan-ſocage; being chiefly found in antient demeſne; its tenants not ameſnable to the county-court; the lands not transferrable but only by ſurrender; not capable of a recovery at common law, but only by writ of right cloſe according to the cuſtom of the manor; and though held by copy of court roll, yet not at the will of the lord. Thoſe who imagine them to be of any other ſpecies of tenure, would do well to inform us what that tenure is, and to ſupport their opinion with authorities equally cogent.

TAKING this then for proved, that the tenants in queſtion are of the nature of villan-ſocmen; it will next be our buſineſs to ſhew,

II. THAT theſe eſtates in villan-ſocage are not comprized under the denomination of FREE LANDS and TENEMENTS, or FREEHOLD, within the meaning of the ſtatutes of HENRY the ſixth.

AND here it will be neceſſary to diſtinguiſh two ſenſes of the word *franktenement* or *freehold*;

hold; the ambiguity of which expreſſion hath occaſioned the principal embaraſſment to ſuch as have already conſidered this queſtion. By the word "*freehold*" then is ſometimes meant the *intereſt* or eſtate itſelf which the tenant holds in the land, ſometimes the *tenure* by which that eſtate is holden. Thus BRACTON[m]: "*Liberum tenementum eſt id quod quis tenet "ſibi et heredibus ſuis*; — *item ad vitam tantum*; *vel eodem modo ad tempus indeterminatum.* —— *Item dicitur liberum tenementum, ad differentiam ejus quod eſt villenagium.*" Therefore a tenant in feeſimple, feetail, or for life, is ſaid to have a freehold *intereſt*, whatever his *tenure* may be: but none except he who holds, or did hold, by knight's ſervice, in free ſocage, or in *frank almoign* can be ſaid to have a freehold *tenure*. In like manner lord COKE[n]; (though perhaps to make complete ſenſe of this paſſage, we muſt tranſpoſe the words *land* and *law*, which ſeem to have been miſplaced by his printer) "a freehold is taken in a double ſenſe: "either 'tis named a freehold in reſpect of the "ſtate of the *land*, and ſo copyholders may be "freeholders; for any that hath an eſtate for his "life, or any greater eſtate, in any land what-"ſoever, may in this ſenſe be termed a free-

[m] L. 4. tr. 1. c. 28. §. 1.

[n] Copyholder, §. 15, 16, 17.

holder

" holder: or in reſpect of the ſtate of the " *law*; and ſo it is oppoſed to copyholders, " that what land ſoever is not copyhold is " freehold." Now it ſeems neceſſary that, in order to make a complete freeholder, to vote at elections, both theſe ingredients muſt concur: he muſt be a freeholder, both in point of intereſt, and in point of tenure: he muſt have at leaſt an eſtate for life, and that eſtate muſt be in free land, or land holden by free ſervices. But theſe villan-ſocmen, though they may have a freehold intereſt, and therefore (it muſt be allowed) are ſometimes denominated freeholders in our books; yet their land is not free but villan land, and therefore they are in no inſtance denominated abſolutely freeholders, but with a qualification ſuperadded, viz. *cuſtomary* freeholders, and, in this caſe as in all others, *additio probat minoritatem.*

THAT ſuch as have a freehold intereſt only in lands, and not a freehold tenure, are incapable of voting at elections, will appear by conſidering the conſequences of the oppoſite doctrine; which would be the allowance of all copyholders, of the baſeſt kind, to have equally votes. For they may likewiſe have a freehold intereſt, as lord COKE has before obſerved; being generally either tenants for life, or in fee;

in

in which caſes it is held that they have *fee and freehold by cuſtom*[o]; or in other words, that the latter, viz. the copyholder in fee, hath a *cuſtomary eſtate of inheritance*[p]: terms, that in their import are at leaſt equivalent to the *cuſtomary freehold*, which our courts of law have ſometimes applied to the eſtate of villan-ſocmen.

LET it further be conſidered, that altho' at the making of theſe ſtatutes of king HENRY the ſixth, and long before, a great part of the common copyholds of the kingdom were in the hands of freemen, and have been ſo entirely for about two centuries paſt, excluſive of villeins or bondmen[q]; yet there is not a ſingle inſtance in all this long period of time, wherein a mere copyholder at will has been allowed or has ever attempted, upon that footing, to give a vote for knights of the ſhire: which proves, that it is not freedom of *perſon*, nor yet a freehold *intereſt*, that will conſtitute a legal elector; unleſs it be alſo joined with that other conſtituent quality, the freedom of *lands*, which is indiſpenſably requiſite to form the complete *frank tenement* of the voter for knights of the ſhire.

FOR it is worthy obſervation, that the ſtatute of 8 HEN. VI. is the principal ſtatute that re-

[o] KITCH. tit. copyhold. [p] 9 Rep. 75. b.
[q] SMITH's Commonw. b. 3. c. 10.

quires the landed qualification; the explanatory act of 10 HEN. VI. only requiring, that the freehold eſtate ſhall be within the ſame county for which the election is had. And the words of this ſtatute of 8 HEN. VI. are that the voter "ſhall have free land or tenement." Which mode of expreſſion plainly ſhews, that it was not merely a freehold *intereſt*, or life eſtate, that was required in the electors; but that the *land* itſelf, and of courſe the tenements incorporeal thereout iſſuing, (as rents, &c.) ſhould be free in point of *tenure*. A freehold intereſt was indeed required, as well as a freehold tenure; for ſo much is implied in the word "HAVE;" ſince no one at common law was ſaid to *have* or to be in poſſeſſion of land, unleſs it were conveyed to him by livery of ſeiſin, which gave him the corporal inveſtiture and bodily occupation thereof; and this ceremony of delivering ſeiſin could not convey a leſs intereſt than for term of life. He therefore that hath an eſtate for years is not ſaid to be poſſeſſed *of the land*, but only *of his term of years*. For, as it is obſerved by ST. GERMAIN [r], "the *poſſeſſion* of the land "is, after the law of ENGLAND, called the "franktenement or freehold;" and BRITTON alſo [s] defines franktenement in this ſenſe to

[r] DR. and STUD. d. 2. c. 22. [s] C. 32.

be

be " *une* POSSESSION *de ſoil, ou de ſervices iſ-* " *ſuantz de ſoil, que fraunk homme tient en* " *fee, a lui, & a ſes heires, ou au meyns a* " *terme de vie.*"

SEEING then a freehold in point of tenure, as well as in point of intereſt, is required by the ſtatute of HENRY the ſixth, it remains only to be ſhewn, that this tenure in villan-ſocage is not a freehold tenure; or that lands and tenements ſo holden are not free lands and tenements within the meaning of that ſtatute.

AND here it might be fully ſufficient to recur to BRACTON's diviſion of tenements above cited, into *tenementa libera, & villenagia*, and to obſerve that this is ranked among the *villenagia*, though it be *villenagium privilegiatum*. It might be ſufficient to recollect, from him and the author of FLETA, that though the tenants themſelves " *dicuntur liberi,* " *eo quod corpora ſua ſunt libera,*" yet their tenements are held " *in villenagio, faciendo inde* " *opera ſervilia, ratione* TENEMENTORUM *licet* " *non ratione* PERSONARUM;" or as BRITTON has expreſſed it, " *ſount fraunks de* SAUNK, *et te-* " *nent* TERRE *in villeinage.*" At the ſame time recollecting alſo that rule of BRACTON [t],

[t] L. 4. tr. 1. c. 9.

" *Quod liber homo nihil libertatis, propter per-*
" *ſonam ſuam liberam, confert villenagio.*" It might be ſufficient to remark that theſe are indiſputably tenants by copy of court-roll, and therefore copyholders; and that lord COKE has juſt now told us, that " in one reſpect " *freeholders* are oppoſed to *copyholders*; ſo " that whatſoever is *not copyhold* is *freehold.*" And we might fairly conclude with obſerving, that three hundred years ago, when this ſtatute was made, the villan ſervices iſſuing out of theſe lands were not univerſally commuted for money, as at preſent, but were frequently performed in ſpecie; which was ſo notorious a badge of ſervile tenure, that no ſheriff could then have entertained a doubt, whether lands and tenements holden by ſuch villan ſervices, were free lands and tenements; and whether their owners ſhould be ranked among " the people of ſmal ſubſtaunce and of no va-" lour," or ſhould be eſteemed " equivalent to " the moſte worthye knyghtes and eſquyars."

BUT to put the matter ſtill farther (if poſſible) out of doubt, it may be worth while to deſcend to particulars, and to ſhew from the ſeveral peculiar properties of their tenure, which we before noted, that it is impoſſible that lands holden in villan-ſocage ſhould be regarded as free

free lands and tenements even at this day, much leſs at the making of this ſtatute.

1. BECAUSE the generality of them are found within ſuch manors as were antient demeſne; and where they are not ſo, ſince they reſemble thoſe of antient demeſne in all other points, they muſt be liable to the ſame conſtruction; there being no reaſon why the villan-ſocmen of private lords ſhould be higher eſteemed than thoſe of the king himſelf. Now here it will be proper to remember an obſervation of chief juſtice HOLT [u], "that tenants in antient de-"meſne are free as to their *perſons*, not as to "their *eſtates*; for if antient demeſne be to be "tried, the iſſue is, whether antient demeſne, "or frank fee." This will be more fully inſiſted on hereafter. In the mean time we may obſerve, that in the ſtatute of 4 and 5 WILL. and MAR. c. 24. jurors are directed to have "ten "pounds by the year—of freehold,—or copy-"hold,—or antient demeſne." Which ſhews, that though they were not eſteemed by the legiſlature (neither is it contended they are) upon a level with common copyholds, yet they were ſuppoſed to be in a middle, or third eſtate, and by no means equivalent to freeholds.

[u] SALK. 57.

IT

IT hath been before hinted, and muſt not be diſſembled, that our law books and courts of law have frequently (eſpecially of late years) diſtinguiſhed theſe eſtates, in antient demeſne and elſewhere, by the name of CUSTOMARY FREEHOLDS; and have laid it down that they cannot be copyholds, unleſs held at the will of the lord[x]: and alſo that a freehold may be ſurrendered by cuſtom in court, without the will of the lord; and that the alienee ſhall not be tenant at will, but ſhall have the inheritance[y]. But in all theſe caſes the terms "freehold and "freeholder" are put in oppoſition to "*com-*"*mon* copyhold and copyholder," to *un* MERE *copyholder*, as BROOK expreſſes it[z], or ſuch as are ſprung from the pure villenage of our antient tenures. For it would be abſurd to ſay that lands, holden by copy, are not copyholds in *any* ſenſe. The truth is, that theſe lands are of ſuch an amphibious nature, that, when compared with mere copyholds, they may with ſufficient propriety be called freeholds; and, when compared with abſolute freeholds, they may with equal, or greater propriety, be denominated copyholds. We do not contend that they are copyholds of baſe tenure, ſubject

[x] CRO. CAR. 229. 2 VENTR. 143. CARTHEW. 432. LORD RAYM. 1225.

[y] FITZH. ABR. tit. corone. 310. cuſtom. 12. BRO. ABR. tit. cuſtom. 2. 17. tenant per copie. 22. 9 REP. 76. CO. LITT. 59 b. 1 ROLL. ABR. 562.

[z] Ten. per copie. 22.

to

to *all* the ſervile badges of pure villenage; but copyholds of a privileged tenure, retaining ſome badges of ſervility and not others; or rather, (negatively) that they are not, purely and abſolutely, freeholds. Whereas the queſtion in all the adjudged caſes above-cited has been, whether *common* copyhold or not, and it has been very juſtly determined that this ſpecies of lands is not common copyhold: but it does not therefore follow that it is purely and ſimply freehold; being on the contrary uſually diſtinguiſhed into a third intermediate ſtate, under the mixed and complicated denominations of cuſtomary freehold, free copyhold, or as lord COKE expreſſes it [a], copyhold of frank tenure.

IT perhaps may be alſo objected, that lord COKE (in the paſſage juſt cited) declares that in theſe copyholds of franktenure, the *freehold* reſteth in the tenant and not in the lord. But this word "freehold" muſt there be underſtood to denote the *intereſt*, and not the *tenure* of the land. And this depends upon a nicety in the modern law, derived from a very ſubſtantial and ſolid reaſon in the old law. When lands were in fact held in pure villenage, the tenant was really tenant at the lord's will, and therefore the law did not allow him to have the

[a] Copyh. §. 32.

freehold

freehold of the land, but declared it to remain in the lord; for tenant at will hath hardly any intereſt at all, much leſs a freehold intereſt. Afterwards, when theſe villeins became modern copyholders, and had acquired by cuſtom a ſure and indefeaſible eſtate for life or in fee, but yet continued to be ſtiled in their copies tenants at the will of the lord; (the omiſſion of which, in their ſtate of villenage, would have been a manumiſſion of their perſons [b]) the law ſtill ſuppoſed it an abſurdity to allow, that ſuch as were thus nominally tenants at will could have any freehold intereſt; and therefore continued, and ſtill continues, to determine, that the freehold of lands ſo holden abides in the lord of the manor; and not in the tenant, though he *really holds* to him and his heirs for ever, ſince he is alſo *ſaid to hold* at another's will. But as to theſe copyholders of free or privileged tenure, the caſe is otherwiſe. They do not, nor ever did, hold at the lord's will; either in fact, or nominally. There is therefore no abſurdity in allowing them capable of enjoying a freehold intereſt; and on that account the law doth not ſuppoſe the freehold of theſe lands to reſt in the lord of whom they are holden, but in the tenants themſelves. BRACTON indeed makes a diſtinction [c] between *native* villan-ſocmen, who are born within antient demeſne; and ſuch as are

[b] MIRR. c. 2. §. 28. LITT. §. 204, 5, 6.

[c] L. 2. c. 8. §. 2.

adventitious,

adventitious, who hold by compact and convention with the lord; apprehending that, though the latter may have a freehold intereſt, the former cannot. " *Conventio & conſenſus domino-* " *rum faciet ei liberum tenementum :*" and again; " *In perſona unius erit liberum tenementum, &* " *in perſona alterius villenagium.*" And yet, granting their *intereſt* to be freehold, it does not follow that their *tenure* is free; for their ſervices, though certain, were not free but villan ſervices; and therefore BRACTON in the ſame ſection declares, " *Quamvis de villano ſocagio fiat cer-* " *tum ſervitium, propter hoc non habebit liberum* " *tenementum.*"

THE teſtimony of Mr. SELDEN to the ſame purpoſe is too deciſive to be here omitted; and he tells us [c] that this matter received a ſolemn judicial determination in the reign of king EDWARD the firſt; when the court, after repeated arguments, adjudged theſe tenants in antient demeſne to be by no means free tenants. " *Ut ſemel de libero homine quid non abs re ad-* " *feram. Eos duntaxat priſcum* ANGLIÆ *jus iſto* " *dignatum eſt nomine, quotquot (ſive avorum* " *imaginibus clari, ſive e plebe ingenui) feudum* " *illud ruſticum non poſſidebant, ſtercutio dicatum;* " *atque buri, plauſtro, trahea, quæ duris agreſ-*

[c] JAN. ANG. l. 2. §. 97.

" *tibus arma, neceſſario onuſtum.—Ut liquidius*
" *res adſeratur, conteſtata ſub* EDW. I. *lite, inter*
" JOHANNEM LEVINUM *actorem, & priorem*
" BERNWELLENSEM *reum, (vetuſto e MS. codice*
" *deprompſi, & concordes juris noſtri annales,*
" *regiorumque reſcriptorum ſyntagma) feudatarios*
" *ab antiquo, quod aiunt, dominico coronæ* LI-
" BERORUM HOMINUM *voce, poſt reciprocatas*
" *& ſatis intenſas altercationes, minime compre-*
" *henſos fori judicio eſt definitum.*"

2. A ſecond argument, to ſhew that theſe tenures in villan-ſocage are not free tenures, will ariſe from their method of transfer or alienation, which was before remarked; viz. by ſurrender into the hands of the lord, and not by the uſual conveyances by deed at the common law. Of theſe feoffment with livery of ſeiſin is ſtill the principal, and was the only original conveyance by which a freehold could paſs, till the ſtatute of uſes in the reign of HENRY the eighth. Hence LITTLETON ſays [d], that " where " a freehold ſhall paſs it behoveth to have livery " of ſeiſin." And the inability of theſe tenants to convey by livery, but only by ſurrender into the hands of the lord, BRACTON deduces from their want of freehold, as well in the place before cited [e], as alſo in the following [f]: " *Si*

[d] §. 59. [e] L. 4. tr. 1. c. 28. [f] L. 2. c. 8. §. 3.

" *autem*

" *autem villanus ſocmannus villanum ſocagium*
" *ad alium transferre voluerit, prius illud reſti-*
" *tuat domino, vel ſervienti ſi dominus præſens*
" *non fuerit; & de manibus ipſorum fiat tranſlatio*
" *ad alium, tenendum libere, vel in ſocagio, ſe-*
" *cundum quod domino placuerit; quia ille vil-*
" *lanus ſocmannus non habet poteſtatem transfe-*
" *rendi, cum liberum tenementum non habeat,*
" *ſed dominus.*"

3. ANOTHER argument, to ſhew that tenants in villan-ſocage are not free tenants, may be drawn from their inability to ſue or be ſued for their lands, or of courſe to levy a fine or ſuffer a recovery in the king's courts of common law; but only in the court baron of the lord, by the peculiar writ of *right cloſe*. " *Non jacet aſſiſa,*
" *&c, quia ibi non eſt liberum tenementum; ſed*
" *loco omnium accipitur parvum breve, &c.* [g]"
This little writ of *right cloſe* may be found in the old REGISTER of writs [h]; and it is worthy of obſervation, that the rule or rubric therein prefixed to this writ expreſsly declares that no freeman can have the uſe of it. " *Fait*
" *aſſayvoir que le petit briefe de droyt gyſt tout-*
" *dis pour ſokmans que ſont del auncien demeſne*
" *le roi; quar nul ſokman poet empleder auter*
" *ſokman de terre, ne de tenement, per auter*

[g] BRACTON, ubi ſupra, l. 4. tr. 3. c. 13. §. 5.
[h] Fol. 9.

" *briefe*

" *briefe que per petit briefe de droyt, quod ſequi-*
" *tur. Et en ceſt briefe ne ſerra pas dit* [*quod*
" *clamat tenere de te per liberum ſervitium* [i]]
" *purceo que null* FRANKE HOME *portera ceſt*
" *briefe.*" This freedom muſt be underſtood of the tenure of his land, for that is the only thing which the writ relates to; being the remedy allotted to recover lands in villan-ſocage, as the ſeveral poſſeſſory actions, by writ of entry and aſſiſe, and in fine the great writ of right patent, were ordained for the recovery of free lands or ſuch as were *frank fee*. For *frank fee* is defined in the OLD TENURES [k] to be land pleadable at the common law; whereas it is ſaid of villan-ſocage, there called, [l] and alſo in the OLD NATURA BREVIUM [m], ſocage of antient tenure, that no writ runs thereof " *forſque le*
" *petit briefe de droit clos, que eſt appel ſecundum*
" *conſuetudinem manerii.*" And hence it is that the OLD NATURA BREVIUM [n], and FITZHERBERT [o] lay it down, that " a fine levied or
" recovery had of lands in the *king's court*
" proves them to be frank fee;" as on the other hand, a recovery had of them in the *lord's court* proves them not to be frank fee. For by the ſtatutes of 15 RIC. II. c. 12. and 16

[i] As in writs of right patent of free lands. Vid. REGISTR. BREV. 1.
[k] Tit. tenir en frank fee. [l] c. tenir en ſocage. [m] tit. garde.
[n] Tit. briefe de recto clauſo. [o] N. B. 13.

RIC.

RIC. II. c. 2. it is enacted, " that none of the " kynge's ſubjectes be compelled, neither by no " way conſtrained to come, ne to apere before " the *counſell* of any lorde or ladie, to anſwere " for his freholde, ne for any thyng touchinge " his frehold, nor for any other thynge reall " nor perſonal, that belongethe to the lawe of " the lande in anye maner." Which word *counſell* ſignifies in its legal ſenſe the court of thoſe lords or ladies; in like manner as in the ſtatute of *præmunire* in the ſame ſeſſion, 16 RIC. II. c. 5. where the offenders are ordered to be " brought before the kynge and his *coun-* " *ſell*," by the king's *counſell* there is always underſtood his court of juſtice.

AND as this peculiar method of recovery, by a writ of *right cloſe* in the lord's court, (which is mentioned by Mr. KITCHEN, above cited [p], as belonging to all this ſpecies of tenants, whether *in* or *out* of antient demeſne;) as this proceſs, I ſay, proves the lands not to be frank fee or free lands; ſo it alſo diſtinguiſhes them from mere copyholds at the will of the lord; which are not impleadable by this writ, but only by bill or plaint [q]. Which therefore ſhews this tenure to be of the amphibious nature we

[p] Tit. copyhold.

[q] STATH. ABR. tit. faux judgm. 5. FITZ. ABR. eod. tit. 5. BRO. ABR. eod. tit. 7. tit. auncien demeſne. 45. F. N. B. 12.

have

have before deſcribed; not a mere copyhold on the one hand, but by no means frank fee on the other.

4. A FOURTH argument, to prove that this tenure cannot be a free tenure, is this; that though the lands be not held at the will of the lord, and therefore the tenant cannot, nor ever could, be ouſted at the lord's pleaſure, as was formerly the caſe in common copyholds; yet ſtill the lands are liable to forfeiture, and the tenant may be ouſted by his own default, for the nonpayment and nonperformance of his rents and ſervices: Which no free tenant, *per liberum ſervitium*, could be by the common law. For the writ of *ceſſavit*, (by which lands may now be recovered againſt a freeholder, for ſuch default for two years together) was firſt given by the ſtatute of GLOCESTER, 6 ED. I; before which the lords had no remedy, but that of diſtreſs, for ſubtraction of freehold ſervices: and at preſent, this writ of *ceſſavit* may be defeated, even pending the ſuit, by tender of amends to the lord. But it is the very condition of the tenure in queſtion, that the lands be holden only ſo long as the ſtipulated ſervice is performed; "*quamdiu velint & poſſint* "*facere debitum ſervitium, & ſolvere debitas* "*penſiones*;" as is the doctrine of BRACTON, BRITTON,

BRITTON, and the reſt, above cited. So too the lord may ſeize their lands for alienation contrary to the cuſtom [r]; and it is not improbable that he has likewiſe the power of ſeizing, if the heir comes not in to be admitted in court at the death of the anceſtor, and for other cauſes, according to the peculiar cuſtoms of each reſpective manor. Now it is impoſſible that tenants thus dependant on their lords, who may by law take the advantage of ſudden forfeitures, and deſtroy their eſtates, can or ever could be ranked in the ſame claſs with abſolute freeholders, whoſe eſtates are not liable to be defeated upon any ſuch ſervile conditions.

5. A FIFTH argument to ſhew that theſe tenures are not freehold tenures, at leaſt with regard to elections of the knights of the ſhire, is not only that they are not members of the county court, where all elections by freeholders are directed to be made; "*non ſectas faciunt ad* "*comitatum* [s];" but alſo becauſe they did not contribute to the wages of the knights of the ſhire, which were formerly raiſed by their conſtituents to defray their expenſes in parliament; and for levying of which there is a writ in the REGISTER [t]. Now theſe tenants in antient de-

[r] BRO. ABR. t. cuſtom. 17.

[s] FLETA, ubi ſupr. l. 1. c. 8. §. 2.

[t] Fol. 191.

meſne

meſne (which compoſe much the greateſt part of thoſe who hold by the tenure before us) were exempted from contributing to theſe expenſes [u]. This muſt not be carried ſo far as ſome have carried it, who inſiſt that all tenants by copy were exempted from this contribution; ſince it ſeems to have been raiſed upon all villeins, as well as freemen, except villeins of antient demeſne and ſuch as belonged to the lords of parliament. For the poſſeſſion and goods of the villein were looked upon as the poſſeſſion and goods of the lord; and if the lord did not go to parliament himſelf, it was reaſonable that his eſtate (by whomſoever held) ſhould bear a proportion of thoſe charges: but if he attended in perſon, it was then equally reaſonable that his eſtate and tenants ſhould be excuſed. And therefore we have writs in the REGISTER [w], not only to exonerate tenants in antient demeſne, but alſo to exonerate the *nativi* or villeins of ſuch lords who perſonally attended the parliament.— "*Quia non eſt juri conſonum, quod nativi prædicti epiſcopi,* [CESTRENSIS] *qui parliamento noſtro prædicto perſonaliter interfuit de mandato noſtro, expenſis contribuant militum prædictorum: præſertim cum bona ipſorum nativorum ſint propria bona dicti epiſcopi.*" But thus much is certain, and it is ſufficient

[u] F. N. B. 228. c. [w] Fol. 261.

for

for the preſent argument, that after the ſtatutes of HENRY the ſixth, ſo long as the cuſtom continued of levying the knight's wages, no perſon who was not contributory to their wages, was admitted to vote for their election. Tenants in antient demeſne were therefore clearly excluded from voting; and, if they were excluded, it is not probable that thoſe whoſe tenures were framed in imitation of theirs, ſhould be admitted to this privilege. However it is allowed, that this argument, as far as it relates to the wages, does not ſo certainly conclude againſt other villan-ſocmen, as villan-ſocmen in antient demeſne; though the not being ameſnable to the county court, as well as the arguments before alleged, conclude equally againſt them all.

THAT no perſon was admitted to vote, but ſuch as were thus contributory, appears from DALTON[x], who is expreſs, that "the freeholders intended by the ſtatutes of HENRY the ſixth, muſt be ſuch freeholders as do contribute to the wages of the knights of the ſhire, or elſe ſuch as are ſuitors to the county court." Mr. LAMBARD likewiſe[y] ſays, "it is known, that they of antient demeſne do preſcribe in not ſending to parliament; for which reaſon alſo they are not contributors

[x] Of Sheriffs, 418.

[y] ARCHEION, 258.

"to

" to the wages of the knights there." And NATHANIEL BACON [z] aſſigns it as a principal reaſon for making thoſe ſtatutes, " that thoſe " men only ſhould have votes, in election of " the common council of the kingdom, whoſe " eſtates were chargeable with the publick " taxes and aſſeſſments, and with the wages of " thoſe perſons that are choſen for the public " ſervice." Wherefore alſo it is expreſly complained of in a petition to the king from the freeholders of *Huntingdonſhire*, 29 HEN. VI. that the ſheriff had admitted and ſworn forty ſeven perſons to poll for knights of the ſhire, " few of them contributors to the knights ex- " penſes [a]." The ſheriff it is true did not think proper to return the perſon ſo polled for, and therefore no formal determination was had in this matter. But it ſeems to have been then looked upon as a notorious piece of preſumption; and thence, as well as upon the reaſon of the thing, Mr. PRYNNE concludes [b], that " none but contri- " butaries to the knights expenſes ſhould have " any voices in the election of knights of the " ſhire for parliament." From the whole therefore it appears that lord chief baron GILBERT upon this, as well as other accounts, was ſufficiently warranted to aſſert [c], that " antient de- " meſne tenants (whom he ſtiles, [d] tenants in

[z] Engliſh governm. p. 2. c. 14. [a] PRYNNE's parl. writs. iii. 159.
[b] Ibid. iv. 605. [c] Hiſt. of the Exchequer, pag. 30. [d] Pag. 19 and 27.

" villenage,

" villenage, and tenants in villan-ſocage) had " no repreſentatives in parliament, being never " eſteemed freemen.

6. The laſt argument that ſhall be offered upon this head is a very conciſe one, and is this; that, however the lawyers may at times have denominated theſe tenures a ſort of baſe ſpecies of freehold, in contradiſtinction to mere copyholds, yet the law in the main regards them as being properly COPYHOLD and not FREEHOLD tenures; elſe they could not have ſubſiſted to this day. For they muſt otherwiſe have been involved in the general fate of the reſt of our antient tenures, when by the ſtatute of 12 CAR. II. c. 24. they all were aboliſhed and reduced to free and common ſocage;—except only tenures in *frank almoign*, and tenures by copy of court roll. Free and common ſocage theſe tenures cannot be; their ſurrenders, and admittances, their frequent fines for alienation, and peculiar paths of deſcent, (from which two laſt, as not being their univerſal properties, no argument hath been hitherto drawn) their forfeitures, recoveries, and privileges, (ſtill regulated by particular cuſtom in derogation of the common law) moſt clearly evince the contrary. Nor will it be pretended that they are of the nature of *frank almoign*. There remains therefore

fore no other choice ; tenures by copy of court roll they muſt be. This is their indelible character: it is to this they owe their preſent exiſtence, and ſurvival of other tenures. The ſtatute has reduced all manner of lay FREEHOLDS to one and the ſame level, of free and common ſocage: but COPYHOLDS remain as they were ; as various, as ſingular, and as ſervile in their tenure as ever. Theſe tenures therefore not being free and common ſocage, muſt neceſſarily remain COPYHOLDS, as entirely as in the time of BRACTON ; of a ſuperior order indeed, and diſtinguiſhed by ſome advantages (formerly real, now nominal only) over the baſer ſort ; but ſtill far ſhort of the dignity, the immunities, and the independence of that FREEHOLD tenure, which for more than three hundred years has conſtituted an elector of knights of the ſhire to ſerve in the ENGLISH PARLIAMENT.

THE END.